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Comptroller General
of the United States

Washington, D.C. 20548

1127149

Decision

Matter of: Foley Company

File: B-253408

Date: September 14, 1993

Seth Price, Esq., Shapiro, Fussell, Wedge & Smotherman, for the protester.
Jack R. Pine, Esq., for CBI Services, Inc., an interested party.
Walker Lee Evey, National Aeronautics and Space Administration, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Low bidder on an invitation for bids (IFB) to repair wind tunnel welds did not have an unfair competitive advantage justifying its exclusion from the competition by virtue of the fact that it prepared and had access to radiographs and associated reader sheets, where the agency analyzed, extracted and distilled the competitively useful information from these documents and included this summary as an appendix to the IFB, which allowed other bidders to intelligently compete on a relatively equal basis.

DECISION

Foley Company protests the eligibility of the apparent low bidder, CBI Services, Inc., for award under invitation for bids (IFB) No. IFB-2-35125(MEL), issued by the National Aeronautics and Space Administration (NASA) for welding repairs on an Ames Research Center wind tunnel.[1] Foley contends that CBI enjoyed an unfair competitive advantage as a result of its prior wind tunnel inspection contracts, whereunder the repairs specified in the instant IFB were identified.

We deny the protest.

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[1]The repairs are to be made to defective butt welds on the pressure shell of the Unitary Plan Wind Tunnel at the Center's Moffett Field, California facility. A CBI affiliate built the tunnel in the early 1950's.

CBI performed the earlier inspections as a subcontractor to NASA's on-site support service contractors.[2] CBI used nondestructive testing[3] to identify defects in weld seams requiring repair. From 1989 to 1991, CBI took approximately 24,000 individual, 4-inch by 14-inch radiographs of approximately 28,000 feet of wind tunnel welds locating 8,882 feet of defective welds. These radiographs were taken, developed, read and turned over to NASA for archiving at the Ames Research Center. CBI did not retain copies of the radiographs,[4] but did retain copies of the associated 24,000 reader sheets, which it also provided to NASA. Reader sheets are forms used to document CBI's interpretation of the weld defects disclosed in each radiograph.

The repairs contemplated by the IFB are done by physically removing or excavating the weld material overlying the defect using a procedure known as arc gouging and rewelding that segment of the weld seam.[5] To prepare the IFB's

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[2]NASA tasked its prime contractors with the inspection work to comply with NASA operational safety standards, specifically, to determine "which existing welds failed to meet the requirements of the ASME Boiler and Pressure Vessel Code, Section VIII, Division I." The prime contractors--first the Boeing Company (1989) and then the Calspan Corporation (1990, 1991 and 1992)--subcontracted the requirement to CBI on a competitive basis.

[3]Forms of nondestructive testing include: radiographic examination, ultrasonic examination and magnetic particle examination.

[4]The protester has not challenged this fact and we find it credible since the agency advises that "[e]ach radiograph is similar to a medical [x]-[r]ay and, should reproduction be required, must be reproduced as a negative prior to making photographic prints." The cost of making a copy is approximately $12 per copy, so it would have cost CBI approximately $288,000 for a "spare set" of radiographs.

[5]Specifically, the repair process consists of pin-pointing the location of the defect, excavating (arc gouging) the defect, conducting a magnetic particle examination of the resulting excavation to ensure that the defect has been completely removed, rewelding the excavation, and radioraphing the completed repair. The cost of repair to the contractor is governed by: (1) the number and location of the volumetric (buried) defects along the weld seams--this determines the number of starts and stops the contractor has to make in gouging and rewelding; and (2) the defects' depth within the weld seams--the deeper the defects, the more

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technical specifications, NASA analyzed the CBI test results/quantification data and incorporated the resulting analysis as data base summaries in the IFB's Appendix A. Appendix A provides data on the location and number of defects, the total length of rejectable defects in each weld seam, and the total length of rejectable defects in each 14-inch or 28-inch interval of each weld seam. The IFD also included appendices providing actual nondestructive examination reports derived from ultrasonic and magnetic particle examination (Appendices B, C and D). The IFB advised bidders that NASA possessed the radiographs and associated reader sheets, to which it would give the repair contractor access in performing the contract work. NASA conducted a pre-bid conference and site-visit that was attended by Foley and CBI.

Award under the IFB was to be made to the low bidder. At the May 6, 1993, bid opening, NASA received eight bids; CBI was the low bidder at $5,239,000, and Foley was second low at $6,248,164. NASA proposes to make award to CBI.

Foley protests that CBI should be ineligible for award since it had an unfair competitive advantage in that it performed the radiographs and prepared the reader sheets on which the statement of work is based, and had access to this and other information regarding the nature of the weld repairs that other bidders did not.

If material information may have been unfairly or improperly made available to a particular competitor, the agency is required to equalize the competition by providing other competitors access to such pertinent information necessary to bid intelligently and on a relatively equal basis, even if this requires reopening the competition or canceling the procurement and resoliciting. 49 Comp. Gen. 251 (1969); Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379. On the other hand, the government has no obligation to equalize a legitimate competitive advantage that a firm may enjoy by virtue of its incumbency (e.g., by seeking from the incumbent information not in the government's files), its own particular business circumstances or because it gained experience under a prior government contract unless the advantage results from a preference or unfair action by the contracting agency. See ENSEC Serv. Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD ¶ 34; S.T. Research Corp., supra. In any case, where it is alleged that a bidder should be

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[5](...continued)
overlying weld has to be removed and the more rewelding done.

excluded or the competition reopened because of that bidder's possession of information not generally available to other firms, the information in question must be competitively useful in order to justify such relief. See Gas Turbine Corp., B-252265.2, May 24, 1993, 93-1 CPD ¶ 400; Person-System Integration, Ltd., B-24927.4, June 30, 1992, 92-1 CPD ¶ 546.

In addition, Federal Acquisition Regulation (FAR) § 9.505-2(b)(1) provides, with certain specified exceptions, that a firm that prepares, or assists in preparing, a competitive solicitation's work statement, or provides material "leading directly, predictably, and without delay" to such a work statement, may not be awarded a contract to supply the system or services covered by the work statement. The purpose of this exclusionary rule is to preclude (1) bias in situations where a preparing firm could tilt technical specifications to favor its own capabilities, see S.T. Research Corp., B-233309, Mar. 2, 1989, 89-1 CPD ¶ 223; or (2) an unfair competitive advantage arising from the contractor's advance knowledge of the agency's requirements. See National Credit Union Admin.; Schreiner, Legge & Co.--Recon., B-244680.2; B-244680.3, Apr. 1, 1992, 92-1 CPD ¶ 329.

Foley alleges that CBI's access to the radiographs and reader sheets--an access that was assertedly denied other bidders who bid the work on the basis of the IFB's analyses of the radiographs and reader sheets[6]--and "the knowledge derived in the preparation of" those documents gave CBI an unfair advance and superior knowledge of the nature of the weld repairs. Foley's initial protest was primarily focused on CBI's asserted possession and use of the radiographs, while its subsequent filing focused on other information to which CBI might have been privy as a result of its prior subcontract work.

In its initial protest, Foley contended that CBI could use the radiographs--that were not provided to the other bidders--to determine each defect's location in the body of the weld (i.e., its location in the weld seam and its relative depth in the seam).[7] From this premise, Foley urged that CBI's superior knowledge of each defect's location allowed it to more accurately determine the amount of gouging and weld replacement necessary to correct the defect, and,

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[6]Foley claims to have interpreted the IFB's advice that copies of the radiographs and reader sheets would be available after award as an agency determination that bidders were denied access to these materials before award.

[7]This initial protest did not mention the reader sheets.

consequently, to make a more accurate assessment of the cost of performing the specified work. Since all parties agree that Appendix A to the IFB does not include information on the relative depth of the defects, Foley asserts that it was required to bid the "worse case," based on an assumption that the contractor would have to excavate all weld material and reweld at all defect sites because the defects might be at the lowest point of the weld in all cases.

After learning from the agency report that CBI had not retained copies of the radiographs, but did have copies of the reader sheets, Foley amended its protest to argue that CBI's unfair competitive advantage

> "consists of the information CBI derived in performing the radiography, regardless of the format in which that information may have been maintained, whether it be reader sheets . . . or other reports generated in connection with the radiography,"[8]

as well as CBI's "ability to talk with the individuals who actually performed the radiography or reviewed the reader sheets or radiographs." Foley claims that CBI's reader sheets could contain information on the "type" of defects--such as porosity problems (gas pockets within the weld) and slag problems (foreign material trapped within the weld)--from which CBI could decide whether or not expensive excavation (arc gouging) was necessary as opposed to less expensive grinding (used to remedy surface defects). Foley asserts these competitive advantages "enabled CBI to eliminate contingencies in its price for which other bidders were required to assume the 'worst case scenario.'"

Nothing in the record suggests that CBI's performance of the inspection services--and consequential receipt, before other bidders, of information concerning the location of wind tunnel weld seam defects--gave that firm an unfair competitive advantage for this IFB. As discussed in detail below, the record evidences that possession of the radiographs and reader sheets should have a minimal effect on bid preparation, given the detailed information contained in Attachment A to the IFB, and that Foley's protest is based on a misapprehension of the data available. See Person-System Integration, Ltd., supra.

First, the IFB contained extensive details about the scope and nature of the welding necessary that was sufficient for bidders to compete on an intelligent and relatively equal

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[8]Foley speculates that CBI may have prepared other "visual reports."

basis. Specifically, Appendix A (consisting of Appendices A1 through A8) is a 650-page document identifying the location and number of defects, including the total length of the rejectable defects in each weld seam. According to CBI, Appendices A7 and A8 to the IFB identity the subsurface imperfections of the welds as well as the surface imperfections which will not require arc gouging.[9] The actual radiographs and reader sheets were not included in the IFB because NASA found they added nothing, for bidding purposes, to the information set out in Appendix A, and that, in any event, the cost of providing radiographic copies to 109 prospective bidders was prohibitive.[10] We note that Foley did not attempt to obtain access to information beyond that provided in the IFB prior to bid opening, even though the solicitation clearly advised that NASA possessed both radiographs and reader sheets.[11]

Moreover, Foley appears to misapprehend or exaggerate the nature and importance of the information contained on the radiographs and reader sheets. The record shows that the radiographic testing was limited to a determination of the defects' location along the weld seam, and that the test results do not disclose the defects' depth within the weld seams. This is so because the wind tunnel's pressure shell has butt welds--i.e., two steel plates are joined together end-to-end with no overlap--configured in a Double-V weld joint.[12] A cross sectional view of a Double-V weld seam,

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[9]Foley does not respond to CBI characterization of the information contained in the Appendices.

[10]NASA calculated that furnishing the 109 prospective bidders with copies of the radiographs (over 2,600,000 copies) would cost in excess of $31,300,000, excluding the cost of mailing.

[11]To the extent that Foley is arguing that NASA should have provided radiographs and reader sheets to the bidders or otherwise allowed bidders to review these materials for "defect depth" or "type" information, this protest ground is untimely raised, because it concerns an alleged solicitation impropriety and was not raised before the time set for the receipt of initial offers. See 4 C.F.R. § 21.2(a)(1) (1993), Thermex Energy Corp., B-227034.2, Aug. 17, 1987, 87-2 CPD ¶ 164. We will only consider the issue of whether CBI was afforded an unfair competitive advantage because of its possession of the reader sheets.

[12]Bidders were informed of the double-V configuration during the March 23 pre-proposal question and answer session when NASA stated that:

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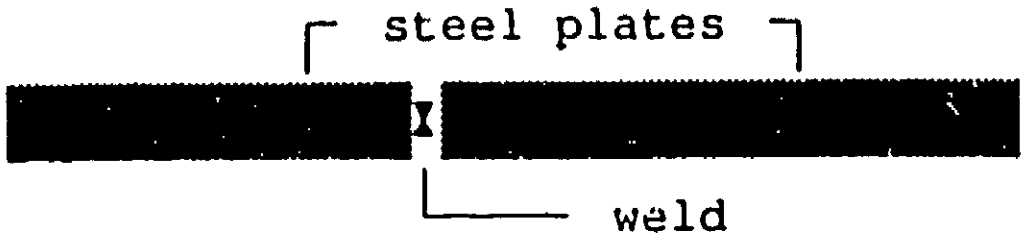
as illustrated below, shows an hour-glass shape (i.e., ⧗) with top "V," or ▽, of the weld corresponding to the top part of hour glass and bottom "V," or △, corresponding to the bottom part of the hour glass:



Defects can occur anywhere in either the top "V" or the bottom "V" of the weld seam, but because the radiograph provides a top-down view, and not a cross-sectional or side view, the reader of the radiograph can only discern the defect's relative position along the weld seam, but not the defect's depth inside the seam (i.e., whether the flaw is in the top "V" or the bottom "V").[13] Therefore, Foley's stated assumption that valuable information was on radiographs or reader sheets regarding the depth of defects inside the seam is in error.[14]

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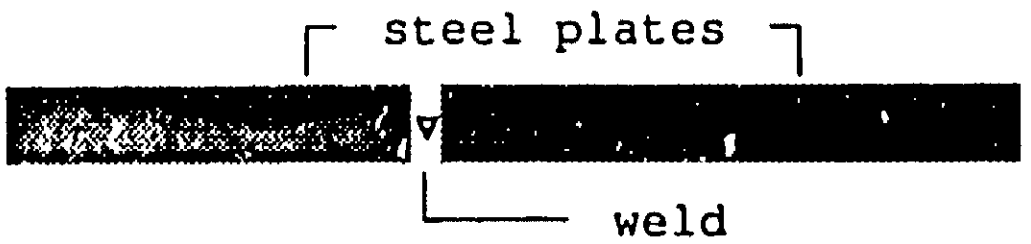
> "[b]utt weld indications found by radiography are volumetric defects, not surface cracks. Radiography provides no indication as to the depth of flaws. Butt weld joint configuration is in general a double-V configuration."

[13]According to NASA, the depth of the defect can only be ascertained through an angle-beam ultrasonic examination, or by physically cutting into the weld itself. NASA rejected these approaches because (1) angle-beam ultrasonic examination is expensive, time consuming, and does not provide a permanent record of the defect's depth; and (2) NASA found it impracticable to take the wind tunnel off-line to physically cut into the tunnel's weld seams.

[14]As illustrated below, Foley apparently assumed that the butt welds have a Single-V weld joint configuration and that, therefore, the deepest part of the weld occurs at the center of the weld's seam:



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Foley's assumptions about the material usefulness of the reader sheets in pricing the requirement also seem misplaced, since there is no evidence that the reader sheets provide significantly more useful information than Appendix A. Given the massive number of radiographs and reader sheets (24,000), it seems incredible that a bidder would have based a bid on an analysis of these materials, given that Appendix A already identifies and essentially provides a competitively useful summary of the defective welds.[15] The agency reports that the radiographs and reader sheets aid the repair contractor in identifying the precise locations of each weld defect (i.e., exactly where to start gouging).[16] The locational information derived from the radiographs and reader sheets does not impact cost because the bidders have already been advised of the number and size of the defects in Appendix A, and the defects' depth within the weld seam is unknown since neither the radiographs nor the reader sheets show defect depth information. While the reader sheets do mention the type of defects in each weld seam, this information has not been shown to materially affect pricing since the bulk of the costs associated with curing the identified defects described in Appendix A appear to be incurred in excavating and rewelding subsurface defects.

CBI has also provided an explanation of what facts it relied upon in preparing its bid, that we find persuasive. CBI advises that it did not refer to its copies of the reader sheets and did not retain any radiographs; rather, CBI used (1) its experience; (2) Appendix A's detailed information;

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In this regard, Foley stated:

> "[t]o the extent the defects were located further to the right or left of the center of the weld, the depth of the repair would necessarily diminish, and thus there would be a lower cost to make the repair."

[15]NASA estimates that it would take 1 man year of effort to intelligently review the radiographs (assuming 5 minutes per radiograph); this does not count the reader sheets.

[16]A tracing is made of the radiograph showing the locations of the defects. The tracing is placed on the actual weld and used as a template to transfer information on defect locations to the actual weld.

and (3) observations CBI made during the site visit.[17] During the visit, CBI observed that some sections of the wind tunnel were hand welded while the rest had been welded with automatic welding equipment.[18] Because of its experience CBI was able to use this information to structure its low bid.[19]

Based on the foregoing, we find Foley has not established that access to the radiographs and reader sheets would have been competitively useful in preparing its bid, and that Appendix A extracted and distilled all the commercially useful information to be found in the radiographs and the reader sheets. Therefore, we do not believe that CBI had an unfair competitive advantage. Even if CBI's prior contact with the wind tunnel was helpful to it--e.g., knowledge that the tunnel's welds consisted of both automatic machine weld and hand welds--we have no basis to conclude that its prior participation resulted from preference or unfair action by the government. Presentations S., Inc., B-196099, Mar. 18, 1980, 80-1 CPD ¶ 209. As indicated above, NASA is not required to compensate for this advantage unless it derives from improper preferential treatment or unfair action. Holmes & Narver Servs., Inc., B-242240, Apr. 15, 1991, 91-1 CPD ¶ 373.

Finally, we do not think that CBI's subcontract work for Boeing and Calspan, which provided NASA with the wind tunnel radiographs and associated reader sheets used in the preparation of the IFB statement of work, requires that firm's exclusion from the competition under FAR § 9.505-2(b)(1). The record shows that the radiographs and reader sheets, prepared by CBI and collected over a span of years from 1989 to 1991, were independently analyzed, and a

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[17]There is no evidence that CBI prepared special "visual reports" while making the radiographs that it later used in the preparation of its bid.

[18]CBI states that the hand welded seams are discernable because they have greater surface irregularity.

[19]CBI states that NASA advised all bidders that the wind tunnel weld joints were of a Double-V configuration. CBI knew from its experience that it was easier to repair automatic welding machine welds than it was to repair hand welds and that in the case of automatic welding machine welds CBI "would [only] have to remove all of the weld metal from one side only to a depth of 50 to 60 percent of the thickness of the material," but CBI would have to excavate and reweld 100 percent of the weld metal in the case of hand welded seams. CBI describes this as an experienced bidder's version of bidding a worst case scenario.

detailed summary prepared by NASA for incorporation into the IFB. There is no evidence that CBI wrote or otherwise contributed to NASA's actual analysis of the radiographs and reader sheets, or to the statement of work/technical specifications included in the IFB. See Associated Chem. and Envtl. Servs., U.S. Pollution Control, Inc., and Chem. Waste Mgmt., Inc., 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248; Gas Turbine Corp., supra. We also note that CBI could not have manipulated the materials (i.e., radiographs and reader sheets) to favor any of the firms' capabilities.[20]

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

[20]In other words, either the radiograph showed a defect, or it did not; and either the reader sheet accurately documented the radiographic defect, or it did not.